80-1435

No.

Office-Supreme Court, U.S.
FILED
FEB 23 1981
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

ARMY AND AIR FORCE EXCHANGE SERVICE,
PETITIONER

v.

JAMES O. GORMAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WADE H. MCCREE, JR.
Solicitor General

THOMAS S. MARTIN
Acting Assistant Attorney General

ELLIOTT SCHULDER
Assistant to the Solicitor General

WILLIAM KANTER
ELOISE E. DAVIES
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1980

No.

ARMY AND AIR FORCE EXCHANGE SERVICE,
PETITIONER

v.

JAMES O. GORMAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

QUESTION PRESENTED

Whether a discharged military exchange employee who was appointed to his position may bring a civil action for monetary damages against the United States under the Tucker Act, 28 U.S.C. 1346(a)(2), predicated upon an implied-in-fact contract.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statutes involved	1
Statement	2
Reasons for granting the petition	4
Conclusion	5

TABLE OF AUTHORITIES

Cases:

Sheehan v. *Army and Air Force Exchange Service*, 619 F.2d 1132	3, 4

Constitution and statutes:

United States Constitution, Fifth Amendment, Due Process Clause	2
Administrative Procedure Act, 5 U.S.C. 702	4
Tucker Act, 28 U.S.C. 1346(a)(2)	1, 3, 4
10 U.S.C. 4779(c)	2
10 U.S.C. 9779(c)	2
28 U.S.C. 1331	4

Appendix A 1a

Appendix B 3a

Appendix C 4a

Appendix D 6a

The Solicitor General, on behalf of the Army and Air Force Exchange Service, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-2a) is reported at 619 F.2d 1141.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, 4a-5a) was entered on June 27, 1980. A petition for rehearing was denied on September 26, 1980 (App. D, *infra*, 6a-7a). On December 18, 1980, Justice Powell extended the time for filing a petition for a writ of certiorari to and including February 23, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The Tucker Act, 28 U.S.C. 1346(a)(2) provides in pertinent part:

> (a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:
>
> * * * * *
>
> (2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for

> liquidated or unliquidated damages in cases not sounding in tort. For the purposes of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

The pertinent regulations are set forth in the appendix to the petition in *Army and Air Force Exchange Service* v. *Sheehan* (Pet. App. 22a-35a).

STATEMENT

Respondent was an appointed employee who served as a merchandising specialist for the Army and Air Force Exchange Service (AAFES).[1] On March 22, 1977, the AAFES formally notified respondent that he would be discharged for cause. Respondent's discharge was sustained upon administrative review (App. A, *infra*, 1a).

Respondent then commenced this action in the United States District Court for the Northern District of Texas, contending that his discharge was arbitrary, capricious, unsupported by substantial evidence, an abuse of discretion, and in violation of pertinent regulations and the Due Process Clause of the Fifth Amendment. Respondent sought, *inter alia*,

---

[1] The AAFES is a nonappropriated fund instrumentality, which means that it does not receive its monies by congressional appropriation. See 10 U.S.C. 4779(c), 9779(c).

monetary damages including back pay.[2] The district court dismissed the action for lack of subject matter jurisdiction (App. B, *infra*, 3a).

The court of appeals reversed (App. A, *infra*, 1a-2a), on the basis of its opinion in *Sheehan* v. *Army and Air Force Exchange Service*, 619 F.2d 1132 (1980). In *Sheehan*, on facts virtually identical to this case, the court of appeals held that the district court had jurisdiction over the plaintiff's claims for monetary relief pursuant to the 1970 amendment to the Tucker Act, 28 U.S.C. 1346(a)(2), which confers jurisdiction over claims founded upon express or implied contracts with certain nonappropriated fund instrumentalities, including the AAFES (619 F.2d at 1137-1138). The court acknowledged the AAFES' argument that the plaintiff's action could not be based on a breach of contract theory because under governing regulations the plaintiff served by appointment rather than by contract (*id.* at 1137). But the court concluded that "[e]ven if the regulations label the *commencement* of [the plaintiff's] employment as pursuant to 'appointment,'" the AAFES' regulations concerning discharge procedures "were part of a collateral implied in-fact contract between [the plaintiff] and the AAFES that the AAFES would adhere to the regulations in its dealings with him" (*id.* at 1137-1138). Accordingly, the court ruled that the plaintiff's allegation that his discharge violated controlling regulations was equivalent to an allegation of a breach of an implied-in-fact contract, and that such a

---

[2] Respondent also sought reinstatement and all benefits of employment of which he had been deprived as a result of his discharge.

claim was sufficient under the Tucker Act to avoid dismissal on jurisdictional grounds (*id.* at 1138).[3]

REASONS FOR GRANTING THE PETITION

The court of appeals in this case relied entirely on its decision in *Sheehan* v. *Army and Air Force Exchange Service, supra,* in holding that the district court had subject matter jurisdiction under the Tucker Act, 28 U.S.C. 1346(a)(2), to consider respondent's claim for monetary relief for his allegedly unlawful discharge. For the reasons set forth in our petition for a writ of certiorari in *Army and Air Force Exchange Service* v. *Sheehan,* we submit that both *Sheehan* and the decision below are incorrect. In light of the manifest error of the court of appeals' decision in *Sheehan,* we have requested the Court in that case to grant the petition for certiorari, reverse the judgment of the court of appeals and remand the case to that court with directions to dismiss, for lack of jurisdiction, those portions of the complaint seeking monetary relief. The Court should dispose of this case in a like manner.

---

[3] The court of appeals, in *Sheehan* (619 F.2d at 1138-1140) and in this case (App. A, *infra,* 2a), also held that the district court had jurisdiction over the plaintiffs' claims for nonmonetary relief pursuant to 28 U.S.C. 1331 and that the requisite waiver of sovereign immunity was provided by the 1976 amendment to the Administrative Procedure Act, 5 U.S.C. 702. We have not sought review of this aspect of the court of appeals' decisions.

CONCLUSION

The petition for a writ of certiorari should be disposed of as appropriate in light of this Court's disposition of the petition for certiorari in *Army and Air Force Exchange Service* v. *Sheehan.*

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

THOMAS S. MARTIN
Acting Assistant Attorney General

ELLIOTT SCHULDER
Assistant to the Solicitor General

WILLIAM KANTER
ELOISE E. DAVIES
Attorneys

FEBRUARY 1981